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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO AND OAKLAND DIVISION

THOMAS FERNANDEZ and LORA  
SMITH, individually and on behalf of a  
class of all other persons similarly situated,

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC.;  
K-M INDUSTRIES HOLDING CO., INC.  
ESOP PLAN COMMITTEE; WILLIAM  
E. AND DESIREE B. MOORE  
REVOCABLE TRUST; TRUSTEES OF  
THE WILLIAM E. AND DESIREE B.  
MOORE REVOCABLE TRUST;  
ADMINISTRATOR OF THE ESTATE OF  
WILLIAM E. MOORE, DECEASED; CIG  
ESOP PLAN COMMITTEE; and NORTH  
STAR TRUST COMPANY,

Defendants.

Case No. C06-07339 MJJ

**NORTH STAR TRUST COMPANY'S  
ANSWER TO FIRST AMENDED  
COMPLAINT**

1 Defendant North Star Trust Company (“North Star”) Answers Plaintiffs’ First Amended  
2 Complaint (the “Complaint”) as follows:

3 1. The statements set forth in Paragraph 1 of the Complaint constitute legal assertions  
4 and conclusions, rather than factual allegations, thereby requiring no answer; to the extent said  
5 statements could be construed to contain allegations of fact, North Star denies each and every  
6 such allegation. North Star admits, however, that Plaintiffs purport to bring this action under  
7 ERISA Section 502, 29 U.S.C. § 1132, under which subject matter jurisdiction would be  
8 conferred pursuant to ERISA Section 502(e), 29 U.S.C. § 1132(e).

9 2. The statements set forth in Paragraph 2 of the Complaint constitute legal assertions  
10 and conclusions, rather than factual allegations, thereby requiring no answer; to the extent said  
11 statements could be construed to contain allegations of fact, North Star denies each and every  
12 such allegation. North Star does not, however, contest that this Court has subject matter  
13 jurisdiction over this matter.

14 3. The statements set forth in Paragraph 3 of the Complaint constitute legal assertions  
15 and conclusions, rather than factual allegations, thereby requiring no answer; to the extent said  
16 statements could be construed to contain allegations of fact, North Star denies each and every  
17 such allegation. North Star does not, however, contest that venue is proper in this district.

18 4. North Star denies each and every allegations set forth in Paragraph 4 of the  
19 Complaint, except admits that the K-M Industries Holding Co., Inc. Employee Stock Ownership  
20 Plan (the “KMH Plan”) is administered in San Mateo County.

21 5. North Star lacks sufficient information to either admit or deny the allegations set  
22 forth in Paragraph 5 of the Complaint and, on that basis, denies each and every such allegation,  
23 except admits that Plaintiff Thomas Fernandez has been a participant, within the meaning of  
24 ERISA Section 3(7), 29 U.S.C. § 1002(7), in the KMH Plan since North Star became trustee of  
25 the KMH Plan on April 22, 2003.

26 6. North Star lacks sufficient information to either admit or deny the allegations set  
27 forth in Paragraph 6 of the Complaint and, on that basis, denies each and every such allegation,  
28 except admits that Plaintiff Lora Smith has been a participant, within the meaning of ERISA

1 Section 3(7), 29 U.S.C. § 1002(7), in the KMH Plan since North Star became trustee of the KMH  
2 Plan on April 22, 2003.

3 7. The statements set forth in Paragraph 7 of the Complaint constitute legal assertions  
4 and conclusions, rather than factual allegations, thereby requiring no answer; to the extent said  
5 statements could be construed to contain allegations of fact, North Star denies each and every  
6 allegation, except admits that KMH was the sponsor of the KMH Plan, within the meaning of  
7 ERISA Section 3(16)(B), 29 U.S.C. § 1002(16)(B), since North Star became trustee of the KMH  
8 Plan on April 22, 2003, admits that KMH was the administrator of the KMH Plan, within the  
9 meaning of ERISA Section 3(16)(A), 29 U.S.C. § 1002(16)(A), since North Star became trustee  
10 of the KMH Plan on April 22, 2003, and asserts that the terms of the KMH Plan speak for  
11 themselves.

12 8. Responding to Paragraph 8 of the Complaint, North Star asserts that the statements  
13 set forth in the first sentence thereof constitute legal assertions and conclusions, rather than  
14 factual allegations, thereby requiring no answer; to the extent said statements could be construed  
15 to contain allegations of fact, North Star denies each and every such allegation. North Star admits  
16 that William E. Moore and Desiree B. Moore were, at one time, trustees of the William E. and  
17 Desiree B. Moore Revocable Trust (the "Trust"). Except as expressly admitted or otherwise  
18 answered, North Star lacks sufficient information to either admit or deny the allegations set forth  
19 in Paragraph 8 and, on that basis, denies each and every such allegation.

20 9. Responding to Paragraph 9 of the Complaint, North Star asserts that the statements  
21 set forth in the first and third sentences thereof constitute legal assertions and conclusions, rather  
22 than factual allegations, thereby requiring no answer; to the extent said statements could be  
23 construed to contain allegations of fact, North Star denies each and every such allegation. North  
24 Star admits that William E. Moore and Desiree B. Moore were, at one time, trustees of the  
25 William E. and Desiree B. Moore Revocable Trust (the "Trust"). Except as expressly admitted or  
26 otherwise answered, North Star lacks sufficient information to either admit or deny the  
27 allegations set forth in Paragraph 9 and, on that basis, denies each and every such allegation.

28 10. Responding to Paragraph 10 of the Complaint, North Star lacks sufficient

1 information to either admit or deny the allegations set forth in the first and fourth sentences  
2 thereof and, on that basis, denies each and every such allegation. The statements set forth in the  
3 second and third sentences of Paragraph 10 constitute legal assertions and conclusions, rather  
4 than factual allegations, thereby requiring no answer; to the extent said statements could be  
5 construed to contain allegations of fact, North Star denies each and every such allegation.

6 11. Responding to Paragraph 11 of the Complaint, North Star lacks sufficient  
7 information to either admit or deny the allegations set forth in the first sentence thereof and, on  
8 that basis, denies each and every such allegation. North Star admits that Mr. Moore was, at one  
9 time, a trustee of the Trust. The statements set forth in the second, third, and fifth sentences of  
10 Paragraph 10 constitute legal assertions and conclusions, rather than factual allegations, thereby  
11 requiring no answer; to the extent said statements could be construed to contain allegations of  
12 fact, North Star denies each and every such allegation. Except as expressly answered or  
13 otherwise admitted, North Star denies each and every allegation set forth in Paragraph 11.

14 12. Responding to Paragraph 12 of the Complaint, the statements set forth in the first,  
15 second and third sentences thereof constitute legal assertions and conclusions, rather than factual  
16 allegations, thereby requiring no answer; to the extent said statements could be construed to  
17 contain allegations of fact, North Star denies each and every such allegations. North Star lacks  
18 sufficient information to either admit or deny the allegations set forth in the fourth and fifth  
19 sentences of Paragraph 11 and, on that basis, denies each and every such allegation, except admits  
20 that the California Capital Insurance Company Employee Stock Ownership Plan (the "CIG Plan")  
21 was merged into the KMH Plan on July 16, 1999, and that William Moore was at times a trustee  
22 and settlor of the Moore Trust.

23 13. Responding to Paragraph 13 of the Complaint, North Star admits that its principal  
24 place of business is Chicago, Illinois, and that it has served as trustee of the KMH Plan from  
25 April 22, 2003 to the present. North Star asserts that the statements set forth in the third sentence  
26 of Paragraph 12 constitute legal assertions and conclusions, rather than factual allegations,  
27 thereby requiring no answer. Except as expressly admitted or otherwise answered, North Star  
28 denies each and every allegation set forth in Paragraph 13.

1           14.     The statements set forth in Paragraph 14 of the Complaint constitute legal  
2     assertions and conclusions, rather than factual allegations, thereby requiring no answer. To the  
3     extent said statements could be construed to contain allegations of fact, North Star denies each  
4     and every such allegation.

5           15.     The statements set forth in Paragraph 15 of the Complaint constitute legal  
6     assertions and conclusions, rather than factual allegations, thereby requiring no answer. Further,  
7     said statements do not allege facts, but merely define terms, making an answer neither necessary  
8     nor appropriate. To the extent said statements could be construed to contain allegations of fact,  
9     North Star denies each and every such allegation.

10          16.     North Star denies each and every allegation set forth in Paragraph 16 of the  
11     Complaint, except admits and alleges that Kelly-Moore Paint Company, Inc. ("Kelly-Moore  
12     Paint") and California Capital Insurance Company are wholly owned subsidiaries of K-M  
13     Industries Holding Co., Inc., that Kelly-Moore Paint is headquartered in San Carlos, California,  
14     and that California Capital Insurance Company is headquartered in Monterey, California.

15          17.     North Star lacks sufficient information to either admit or deny the allegations set  
16     forth in Paragraph 17 of the Complaint and, on that basis, denies each and every such allegation,  
17     except admits that Kelly-Moore Paint has been named as a defendant in various lawsuits arising  
18     out of the manufacture of asbestos-containing joint compound, wall, and ceiling texture by Paco  
19     Textures Corporation, a former subsidiary of Kelly Moore Paint, which was dissolved in January  
20     1982.

21          18.     North Star lacks sufficient information to either admit or deny the allegations set  
22     forth in Paragraph 18 of the Complaint and, on that basis, denies each and every such allegation,  
23     except admits and alleges that Kelly-Moore Paint purchased California Mutual Insurance  
24     Company (now known as California Capital Insurance Company) in 1986.

25          19.     North Star denies each and every allegation set forth in Paragraph 19 of the  
26     Complaint, except admits that in 1998 Kelly-Moore Paint changed its name to K-M Industries  
27     Holding Co., Inc; alleges that a new California company was incorporated and named Kelly-  
28     Moore Paint Company, Inc.; admits that Kelly-Moore Paint Company and California Capital

1 Insurance Company are wholly owned subsidiaries of K-M Industries Holding Co., Inc.; and  
2 admits that the William E. and Desiree B. Moore Revocable Trust has been the majority  
3 shareholder in KMH since 1998.

4 20. North Star denies each and every allegation set forth in Paragraph 20 of the  
5 Complaint, except admits that Series P stock reflects the value of Kelly Moore Paint Company,  
6 Inc., and that Series I stock reflects the value of California Capital Insurance Company.

7 21. North Star lacks sufficient information to either admit or deny the allegations set  
8 forth in Paragraph 21 of the Complaint and, on that basis, denies each and every such allegation,  
9 except admits and alleges that KMH sued Union Carbide in Texas and that the publicly filed  
10 documents in that litigation speak for themselves.

11 22. North Star admits the allegations set forth in Paragraph 22 of the Complaint.

12 23. North Star admits the allegations set forth in Paragraph 23 of the Complaint.

13 24. North Star denies each and every allegation set forth in Paragraph 24, except  
14 admits that the CIG Plan was merged into the Kelly-Moore Paint Company, Inc. Employee Stock  
15 Ownership Plan (the "Paint Plan") effective July 16, 1999 and that the KMH Plan was  
16 administered in San Carlos, California, and alleges that the terms of the KMH Plan speak for  
17 themselves.

18 25. North Star lacks sufficient information to either admit or deny the allegations set  
19 forth in Paragraph 25 of the Complaint and, on that basis, denies each and every such allegation.

20 26. North Star denies each and every allegation set forth in Paragraph 26 of the  
21 Complaint, except admits and alleges that the Paint Plan purchased 33,745,455 shares of KMH  
22 Series P-B stock on October 13, 1998 for \$232 million (\$6.875 per share), that the Paint Plan  
23 borrowed \$232 million pursuant to a promissory note dated October 13, 1998, the terms of which  
24 speak for themselves.

25 27. North Star lacks sufficient information to either admit or deny the allegations set  
26 forth in Paragraph 27 of the Complaint and, on that basis, denies each and every such allegation.

27 28. The statements set forth in Paragraph 28 of the Complaint constitute legal  
28 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the

1 extent said statements could be construed to contain allegations of fact, North Star denies each  
2 and every such allegation.

3 29. North Star lacks sufficient information to either admit or deny said allegations set  
4 forth in Paragraph 29 of the Complaint and, on that basis, denies each and every such allegation.

5 30. North Star lacks sufficient information to either admit or deny said allegations set  
6 forth in Paragraph 30 of the Complaint and, on that basis, denies each and every such allegation.

7 31. North Star lacks sufficient information to either admit or deny the allegations set  
8 forth in Paragraph 31 of the Complaint and, on that basis, denies each and every such allegation.

9 32. North Star lacks sufficient information to either admit or deny the allegations set  
10 forth in Paragraph 32 of the Complaint and, on that basis, denies each and every such allegation.

11 33. North Star denies each and every allegation set forth in Paragraph 33 of the  
12 Complaint, except admits and alleges that the CIG Plan purchased 8,400,000 shares of KMH  
13 Series I-B stock on October 18, 1999 for \$55 million (\$6.55 per share (rounded)), that the KMH  
14 Plan borrowed \$55 million from KMH to finance the purchase, pursuant to a promissory note, the  
15 terms of which speak for themselves.

16 34. North Star lacks sufficient information to either admit or deny the allegations set  
17 forth in Paragraph 34 of the Complaint and, on that basis, denies each and every allegation.

18 35. North Star lacks sufficient information to either admit or deny the allegations set  
19 forth in Paragraph 35 of the Complaint and, on that basis, denies each and every allegation.

20 36. North Star lacks sufficient information to either admit or deny said allegations set  
21 forth in Paragraph 36 of the Complaint and, on that basis, denies each and every such allegation.

22 37. North Star lacks sufficient information to either admit or deny the allegations set  
23 forth in Paragraph 37 of the Complaint and, on that basis, denies each and every such allegation.

24 38. North Star lacks sufficient information to either admit or deny said allegations set  
25 forth in Paragraph 38 of the Complaint and, on that basis, denies each and every such allegation.

26 39. North Star lacks sufficient information to either admit or deny the allegations set  
27 forth in Paragraph 39 of the Complaint and, on that basis, denies each and every such allegation.

28 40. North Star lacks sufficient information to either admit or deny the allegations set



1 forth in Paragraph 40 of the Complaint and, on that basis, denies each and every such allegation.

2 41. North Star lacks sufficient information to either admit or deny the allegations set  
3 forth in Paragraph 41 of the Complaint and, on that basis, denies each and every such allegation.

4 42. North Star lacks sufficient information to either admit or deny the allegations set  
5 forth in Paragraph 42 of the Complaint and, on that basis, denies each and every such allegation.

6 43. North Star denies each and every allegation set forth in Paragraph 43 of the  
7 Complaint.

8 44. North Star denies each and every allegation set forth in Paragraph 44 of the  
9 Complaint, except admits and alleges that the KMH Plan did not provide Summary Annual  
10 Reports of the KMH Plan to KMH Plan participants in Plan Years 2003 and 2004, and that the  
11 Department of Labor's investigation of the KMH Plan's failure to do so resulted in the issuance  
12 of a formal "no action" letter by the Department of Labor.

13 45. North Star denies each and every allegation set forth in Paragraph 45 of the  
14 Complaint.

15 46. North Star admits the allegations set forth in Paragraph 46 of the Complaint.

16 47. North Star asserts that the statements set forth in Paragraph 47 of the Complaint  
17 constitute legal assertions and conclusions, rather than factual allegations, thereby requiring no  
18 answer; to the extent said statements could be construed to contain allegations of fact, North Star  
19 denies each and every such allegation.

20 48. North Star lacks sufficient information to either admit or deny the allegations set  
21 forth in Paragraph 48 of the Complaint and, on that basis, denies each and every such allegation.

22 49. North Star denies each and every allegation set forth in Paragraph 49 of the  
23 Complaint.

24 50. North Star denies each and every allegation set forth in Paragraph 50 of the  
25 Complaint.

26 51. North Star denies each and every allegation set forth in Paragraph 51 of the  
27 Complaint.

28 52. North Star lacks sufficient information to either admit or deny the allegations set



1 forth in Paragraph 52 of the Complaint and, on that basis, denies each and every such allegation.

2 53. The statements set forth in Paragraph 53 of the Complaint constitute legal  
3 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
4 extent said statements could be construed to contain allegations of fact, North Star denies each  
5 and every such allegation, except admits that Plaintiffs purport to bring this action on behalf of a  
6 class, and alleges that Plaintiffs' definition of the purported class speaks for itself.

7 54. The statements set forth in Paragraph 54 of the Complaint constitute legal  
8 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
9 extent said statements could be construed to contain allegations of fact, North Star denies each  
10 and every such allegation, except lacks sufficient information to either admit or deny the  
11 allegations set forth in the third sentence of Paragraph 54 and, on that basis, denies each and  
12 every such allegation.

13 55. The statements set forth in Paragraph 55 of the Complaint, and each subparagraph  
14 thereof, constitute legal assertions and conclusions, rather than factual allegations, thereby  
15 requiring no answer; to the extent said statements could be construed to contain allegations of  
16 fact, North Star denies each and every such allegation.

17 56. The statements set forth in Paragraph 56 of the Complaint constitute legal  
18 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
19 extent said statements could be construed to contain allegations of fact, North Star denies each  
20 and every such allegation.

21 57. North Star denies each and every allegation set forth in Paragraph 57 of the  
22 Complaint, except lacks sufficient information to either admit or deny the allegations set forth in  
23 the first sentence of Paragraph 57 thereof and, on that basis, denies each and every such  
24 allegation, except does not contest that Plaintiffs' counsel is qualified to handle this litigation.

25 58. The statements set forth in Paragraph 58 of the Complaint constitute legal  
26 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
27 extent said statements could be construed to contain allegations of fact, North Star denies each  
28 and every such allegation.

1           59.     The statements set forth in Paragraph 59 of the Complaint constitute legal  
2     assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
3     extent said statements could be construed to contain allegations of fact, North Star denies each  
4     and every such allegation.

5           60.     The statements set forth in Paragraph 60 of the Complaint constitute legal  
6     assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
7     extent said statements contain allegations of fact, North Star lacks sufficient information to either  
8     admit or deny such allegations and, on that basis, denies each and every such allegation.

9           61.     By way of responding to Paragraph 61 of the Complaint, North Star incorporates  
10    by reference herein its responses to Paragraphs 1 through 58 above, as though fully set forth  
11    herein.

12          62.     The statements set forth in Paragraph 62 of the Complaint constitute legal  
13    assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
14    extent said statements could be construed to contain allegations of fact, North Star denies each  
15    and every such allegation.

16          63.     The statements set forth in Paragraph 63 of the Complaint constitute legal  
17    assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
18    extent said statements could be construed to contain allegations of fact, North Star denies each  
19    and every such allegation.

20          64.     The statements set forth in Paragraph 64 of the Complaint constitute legal  
21    assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
22    extent said statements could be construed to contain allegations of fact, North Star denies each  
23    and every such allegation.

24          65.     The statements set forth in Paragraph 65 of the Complaint constitute legal  
25    assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
26    extent said statements could be construed to contain allegations of fact, North Star denies each  
27    and every such allegation.

28          66.     North Star asserts that the statements set forth in Paragraph 66 of the Complaint

1 constitute legal assertions and conclusions, rather than factual allegations, thereby requiring no  
2 answer; to the extent said statements could be construed to contain allegations of fact, North Star  
3 denies each and every such allegation.

4 67. The statements set forth in Paragraph 67 of the Complaint constitute legal  
5 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
6 extent said statements could be construed to contain allegations of fact, North Star denies each  
7 and every such allegation.

8 68. North Star denies each and every allegation set forth in Paragraph 68 of the  
9 Complaint.

10 69. By way of responding to Paragraph 69 of the Complaint, North Star incorporates  
11 by reference herein its responses to Paragraphs 1 through 60 above, as though fully set forth  
12 herein.

13 70. The statements set forth in Paragraph 70 of the Complaint constitute legal  
14 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
15 extent said statements could be construed to contain allegations of fact, North Star denies each  
16 and every such allegation.

17 71. The statements set forth in Paragraph 71 of the Complaint constitute legal  
18 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
19 extent said statements could be construed to contain allegations of fact, North Star denies each  
20 and every such allegation.

21 72. The statements set forth in Paragraph 72 of the Complaint constitute legal  
22 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
23 extent said statements could be construed to contain allegations of fact, North Star denies each  
24 and every such allegation.

25 73. North Star denies each and every allegation set forth in the second, third, and  
26 fourth sentences of Paragraph 73 of the Complaint. The statements set forth in the first sentence  
27 of Paragraph 73 constitutes legal assertions and conclusions, rather than factual allegations,  
28 thereby requiring no answer; to the extent said statements could be construed to contain

1 allegations of fact, North Star denies each and every such allegation.

2 74. North Star denies each and every allegation set forth in the second, third, and  
3 fourth sentences of Paragraph 74 of the Complaint. The statements set forth in the first sentence  
4 of Paragraph 74 constitutes legal assertions and conclusions, rather than factual allegations,  
5 thereby requiring no answer; to the extent said statements could be construed to contain  
6 allegations of fact, North Star denies each and every such allegation.

7 75. North Star denies each and every allegation set forth in Paragraph 75 of the  
8 Complaint.

9 76. The statements set forth in Paragraph 76 of the Complaint constitute legal  
10 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
11 extent said statements could be construed to contain allegations of fact, North Star denies each  
12 and every such allegation.

13 77. The statements set forth in Paragraph 77 of the Complaint constitute legal  
14 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
15 extent said statements could be construed to contain allegations of fact, North Star denies each  
16 and every such allegation.

17 78. The statements set forth in Paragraph 78 of the Complaint constitute legal  
18 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
19 extent said statements could be construed to contain allegations of fact, North Star denies each  
20 and every such allegation.

21 79. North Star denies each and every allegation set forth in Paragraph 79 of the  
22 Complaint.

23 80. North Star denies each and every allegation set forth in Paragraph 80 of the  
24 Complaint.

25 81. The statements set forth in Paragraph 81 of the Complaint constitute legal  
26 assertions and conclusions, rather than factual allegations, thereby requiring no answer; to the  
27 extent said statements could be construed to contain allegations of fact, North Star denies each  
28 and every such allegation.

82. The statements set forth in Plaintiffs' Prayer for Relief constitute claims for relief and legal contentions, rather than factual allegations, thereby requiring no answer; to the extent that any such statements could be construed to contain allegations of fact, North Star denies each and every such allegation. North Star further alleges that Plaintiffs are not entitled to any of the requested relief.

83. North Star denies each and every allegation set forth in the Complaint that is not specifically admitted herein above.

### **AFFIRMATIVE DEFENSES**

As separate and distinct affirmative defenses to the claims asserted in the Complaint, North Star alleges, on information and belief, as follows:

#### **FIRST AFFIRMATIVE DEFENSE**

The Complaint, and each Claim for Relief set forth therein, fails to state facts sufficient to plead a claim upon which relief can be granted against North Star.

#### **SECOND AFFIRMATIVE DEFENSE**

Plaintiffs have sustained no cognizable losses relating to the Plans and therefore lack standing to bring this action.

#### **THIRD AFFIRMATIVE DEFENSE**

The applicable statutes of limitations including, but not limited to, ERISA Section 413, 29 U.S.C. § 1113, bar each and every purported claim alleged by Plaintiffs.

#### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are individual in nature and therefore may not be asserted on behalf of the Plans under ERISA Sections 409 and 502(a)(2), 29 U.S.C. § 1109 and 1132(a)(2).

#### **FIFTH AFFIRMATIVE DEFENSE**

No claim is stated upon which relief can be granted to the extent that Plaintiffs' Complaint seeks money damages or other legal relief under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

#### **SIXTH AFFIRMATIVE DEFENSE**

If Plaintiffs suffered any damages, which North Star denies, these damages proximately

1 resulted from the acts or omissions of persons or entities other than North Star.

2 **SEVENTH AFFIRMATIVE DEFENSE**

3 Plaintiffs failed to mitigate their alleged damages, thereby precluding or reducing  
4 Plaintiffs' right of recovery, if any, from North Star.

5 **EIGHTH AFFIRMATIVE DEFENSE**

6 North Star is protected from liability by Section 409(b) of ERISA, 29 U.S.C. § 1109(b), to  
7 the extent that the alleged fiduciary breaches in the Complaint occurred before or after it was a  
8 fiduciary.

9 **NINTH AFFIRMATIVE DEFENSE**

10 The alleged fiduciary conduct described in the Complaint was performed, in whole or in  
11 part, by an independent entity for whose conduct North Star is not responsible and cannot be held  
12 liable.

13 **TENTH AFFIRMATIVE DEFENSE**

14 Plaintiff's purported claim under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), fails  
15 to state a claim upon which relief can be granted because the relief sought thereby is duplicative  
16 of the relief sought under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2).

17 **ELEVENTH AFFIRMATIVE DEFENSE**

18 Plaintiffs fail to state a claim under ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§  
19 1132(a)(2) & (a)(3), to the extent North Star was not acting in a fiduciary capacity.

20 **TWELFTH AFFIRMATIVE DEFENSE**

21 The Complaint fails to state a claim upon which relief can be granted to the extent that  
22 Plaintiffs' purported claims amount to claims for benefits, since Plaintiffs have failed to exhaust  
23 their administrative remedies.

24 **THIRTEENTH AFFIRMATIVE DEFENSE**

25 Plaintiffs' claims are barred by the doctrines of laches.

26 **FOURTEENTH AFFIRMATIVE DEFENSE**

27 Plaintiffs fail to plead their allegations of fraud and concealment with the requisite  
28 particularity.

**FIFTEENTH AFFIRMATIVE DFEFENSE**

Because Plaintiffs' Complaint is vague, ambiguous, uncertain, and couched in conclusory terms, North Star cannot fully anticipate all defenses that may be applicable to this action. Accordingly, North Star reserves the right to assert additional defenses if and to the extent that such defenses are applicable.

WHEREFORE, North Star respectfully requests that the Court dismiss the Complaint in its entirety, award North Star its costs and attorneys' fees incurred in defending this action, and award such other relief as it deems just and proper.

Dated: June 22, 2007

MORGAN, LEWIS & BOCKIUS LLP

By /s/ Nicole A. Diller

Nicole A. Diller, Esq.

Lisa S. Serebin, Esq.

Andrew C. Sullivan, Esq.

Attorneys for North Star Trust Company